Supreme Court U.S.
FILED
OCT 24 2002
OFFICE OF THE CLERK

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No. 02-218

IN THE SUPREME COURT of the UNITED STATES

Robert W. Grine II, Joanne D. Grine, Estate of Margaret M. Grine,
Petitioners

v.

William R. Coombs; et al.

On Petition for a Writ of Certiorari
To the Third Circuit Court of Appeals

REPLY BRIEF

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15 pp

QUESTION PRESENTED

I. Whether the Third Circuit Court of Appeals infringed upon Petitioners' fundamental rights to due process and rights of access to the courts when it summarily granted the United States' Rule 27 Motion to dismiss the Petitioners' appeal as of right from a final order certified pursuant to Rule 54(b), on grounds that the appellate court lacked jurisdiction over the subject matter of the appeal, and without disturbing the propriety of the district court's execution of certification?

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For the Third Circuit

Petitioners' Reply Brief

OPINIONS BELOW

The summary decision of the Third Circuit Court of Appeals which granted the United States' Rule 27 Motion to dismiss the Petitioners' Appeal as docketed at No. 01-4118 and as taken from the district court order certified in accordance with Rule 54(b) of the Federal Rules of Procedure and entered on September 19, 2001, was filed on February 27, 2002.

The appellate order summarily denying the Petitioners' timely-filed Petition for Rehearing was entered on April 23, 2002.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The summary decision of the United States Court of Appeals granting the United States' Rule 27 Motion for Dismissal of the appeal at No. 01-4118 was entered on February 27, 2002. The Court of Appeals denied Petitioners' timely-filed Petition for Rehearing on April 23, 2002.

The question presented did not arise until Petitioners received the appellate court's order of February 27, 2002 granting the United States' Rule 27 Motion to dismiss the appeal docketed at No. 01-418 by the Court of Appeals on November 14, 2001. Petitioners thereupon sought rehearing arguing that the Court of Appeals had erred in prohibiting a timely appeal as of right from a final order and that its decision resulted in fundamental unfairness and a violation of the due process clause of the federal constitution.

The jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked pursuant to 28 U.S.C. §1331.

STATEMENT

Petitioners will not reiterate here the bulk of their statement of the case as detailed in their July-filed petition for certiorari, but do wish to reemphasize that in their Amended Complaint they brought suit against the U.S. EPA for violations of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §6901 et seq. and for violations of the Comprehensive Environmental Response and Liability Act of 1980, 42 U.S.C.A. §9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986. Petitioners also sued the U.S. EPA for its violation of the Freedom of Information Act, 5 U.S.C. §552.

ARGUMENT

The federal appellees have made a startling concession in their brief in opposition as to the correctness of their prior argument presented in their Rule 27 Motion. Since such a confession is fresh, it needs to be discussed at the first opportunity. To begin with, the summary order of the Third Circuit Court of Appeals dismissing the petitioners' appeal from a certified order for lack of subject-matter jurisdiction is constitutionally defective and has resulted in the deprivation of the petitioners' substantive and procedural rights to due process of law. Review by this court is thus warranted.

The federal appellees argued strenuously in their Rule 27 Motion, as submitted to the Third Circuit, that the appellate court should dismiss petitioners' appeal for lack of subject-matter jurisdiction because the district court judge could prohibit an immediate appeal as of right from a certified order in reliance on Rule 62(h). The federal appellees knew that this argument was specious when they made it. As they have accurately reflected in their brief in opposition to the petition for certiorari, ". . . a stay under rule 62(h) subsequent to Rule 54(b) certification does not interfere with the appealability of that judgement." Fed. Brief at 6 (citations omitted).

The federal appellees should have completed their legal research before and not after they submitted their Rule 27 motion to the Court of Appeals.

A fatally flawed argument was both presented and embraced in bad faith (and in bad taste) by the federal appellees. The Third Circuit did nothing to signify its awareness of the impropriety of this argument; instead it ruled in favor of the federal appellees.

The Court of Appeals summarily (i.e., without explanation) granted the federal appellees' Rule 27 motion to dismiss the appeal for lack of subject-mater jurisdiction. The Court of Appeals <u>never</u> made the slightest attempt to assess the validity of the certification executed by the district court judge, and never acknowledged that prohibition of an

appeal subsequent to certification was truly unprecedented; i.e., unheard of. As petitioners have said before, the rule of finality is not subject to a judicially created exception at the district court level though the district court's improper reliance on Rule 62(h), in conjunction with a Rule 54(b) certificate of finality.

As the appellate court unambiguously stated in Delaware Valley, (Delaware Valley Citizens Council for Clean Air v. Davis, 932 F.2d 256 (3rd Cir. 1991)), if the district court properly certified its orders as final judgements for purposes of appeal, the Court must then exercise its jurisdiction over an appeal as of right.

Although it is late in the day, the federal appellees in their brief have recognized the wisdom of this position: See Fed. Brief at 6, 7: . . ."[I]f the district court properly made [the Rule 54(b)] certification, we must then exercise jurisdiction over this appeal." Delaware Valley, at 263. And, as this Court has held, "[I]f the District Court certifies a final order on a claim which arises out of the same transaction and occurrence as pending claims, and the Court of Appeals is satisfied that there has been no abuse of discretion, the order is appealable." Cold Metal Process Co. v. United Engineering & Foundry Co., 76 S. Ct. 904, 100 L.Ed. 1311 (1956).

The Court of Appeals must consider the propriety of Rule 54(b) certification because such certifications implicate the scope of the court's appellate jurisdiction. See Ebrahimi v. City of Huntsville Bd of Educ., 114 F.3d. 162 (11th Cir. 1997); Delaware Valley Citizens Council for Clean Air v. Davis, 932 F.2d 256 (3rd Cir. 1991): National Union Fire Insurance Company v. City Sav., F.S.B., 28 F.3d 376 (3rd Cir. 1994) as amended.

The appellate court made no inquiry whatsoever of record to determine if certification was proper, and let the entry of certification pursuant to Rule 54(b) stand undisturbed. The Court of Appeals never made any finding that the district court's decision to certify was erroneous. It never even considered the propriety of the Rule 54(b) certification as executed by the district court. Such a review

was mandatory to establish the scope of appellate jurisdiction. See Curtiss-Wright. Thus there is no disposition made of record to indicate that the Court of Appeals ever noticed or found that the district court orders as certified pursuant to Rule 54(b) were not final orders within the meaning of §1291.

The district court's adjudication became final when it executed its certificate. Without intervention by this court, petitioners will be denied an immediate appeal as of right from a standing final order, nor can petitioners ask for review or reconsideration of an order that has lost its interlocutory status, before an end-of-case judgement is effected at some future date.

Petitioners have been stripped of both their right to take an immediate appeal from a final order and their right to challenge the order on an interlocutory basis prior to judgement. The federal appellees are absolutely right when they note there is no other case on the books in which the district court judge certified an order prior to making the decision to prevent an immediate appeal. (To this we say: there is now.)

The Court of Appeals apparently dismissed for lack of subject-matter jurisdiction because it approved of the federal argument that the judge who executed the certification could decide to block an appeal of the certified order. This is the only possible explanation in view of the fact that the Court did not challenge the propriety of the certification executed in the district court. Petitioners are certainly not "in the same position that they would have been in had the district court refused to certify." (Fed. Brief at 8; Ftn. 4.) Petitioners have been denied due process because given the current posture of this case, they are confronted with an inviolate order which cannot be immediately appealed. Nor can it, prior to judgement day, be challenged or its revision sought because its true interlocutory character has never been restored by the appellate court. The Court of Appeals has not and does not intend to make the finding that it was error for the district court to certify, or to determine that immediate appeal could be precluded after certification.

The text of Rule 54(b) states the following:

(b) **Judgement Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgement as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgement. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgement adjudicating all the claims and the rights and liabilities of all the parties. (Emphasis supplied.)

So long as the certification is undisturbed, the appellants when they return to the district court cannot effect reconsideration or revision of said order.

Subsequent to the filing of Petitioners writ of certiorari on July 19, 2002, the petitioners motioned for clarification from the Court of Appeals as to date of issuance of the mandate. The Clerk of Court responded by personally denying the motion and stating that "the appeal was decided by an order on a motion and not by the entry of final judgement." See Exh. A, Denial of Appellant's Rule 27 Motion for Correction of Record and Issuance of Mandate. The Clerk stated that the Court had nothing to convey in the form of a directive to the district court: "The purpose of the mandate is to return jurisdiction back to the district court and to convey any directives of the court of appeals to the district court. Since this Court determined that it lacked appellate jurisdiction over the appeal, neither of these purposes would have been served by issuance of a mandate." The federal appellees appear to be under the impression that the Court of Appeals did effect a judgement: ". . .[T]hey [the Petitioners] seek review of the judgement of

the Court of Appeals. That judgement ... dismissed petitioners' appeal for lack of jurisdiction ..." Fed. Brief at 7.

This is a further illustration of the Court of Appeals' intent to leave untouched the certification effected in the district court and the district court's decision to prohibit an appeal as of right. Petitioners can neither take an immediate appeal from the certified order nor can they challenge the order on the grounds that it is interlocutory and open to revision prior to judgement. The district court, with the assistance of the federal appellees and the encouragement of the court of appeals, has fashioned an order inaccessible to any challenge from Petitioners. It is not inaccurate for petitioners to say that a sacred cow is on the horizon. Petitioners at the present time are unarmed against this development. It was the clear duty of the reviewing court to follow precedent; i.e., the appellate court was duty-bound to assess the propriety of the trial court's certification and the propriety of its attempt to eliminate an appeal subsequent to its own certification of the challenged order. See Curtiss-Wright. The Court of Appeals must scrutinize the district court's evaluation of factors resulting in certification for immediate appeal. It must also scrutinize the district court's desire to eliminate an immediate appeal subsequent to certification. The Court of Appeals was never ignorant of the fact that certification cannot be executed by a district court judge who intends to preclude an immediate appeal of the certified order. Thus, the Court of Appeals could not properly defer to the district court's judgement given its knowledge that the district court sought to eliminate the petitioners' right to an immediate appeal from a final order. If the Court of Appeals dismissed the appeal for lack of subject-matter jurisdiction because it liked the argument that the district court judge could execute the certification and at the same time eliminate the petitioners' right to take an immediate appeal, the Court erred. See Curtiss-Wright.

If the Court of Appeals believed that the certification was flawed, it had a duty to reach this conclusion on the record, and certainly was not free to defer to the defective reasoning of the district court.

The federal appellees were deadly accurate in their statement that "the court of appeals ... did not explain why it was dismissing for lack of jurisdiction." Fed. Brief at 8. They were dead wrong in suggesting that this failure does not create a conflict with other existing authority. On the contrary, the Court of Appeals' ruling is at war with every other decision in this area that is still on the books, including its own Third Circuit precedent and every Supreme Court opinion yet written on this subject. Of course, petitioners have not cited a case (other than this one) in which a court of appeals exercised jurisdiction over a certified order despite a district judge's decision to eliminate an appeal. No such case is on the books. The federal appellees, however, did just that - they improperly relied on Curtiss-Wright for the proposition that Rule 62(h) can be utilized subsequent to a certification to preclude an appeal. Such a proposition cannot be derived from any reading, fair or otherwise, of Curtiss-Wright. The federal appellees have exhibited a lack of remorse concerning the true character of the arguments made in their Rule 27 motion. This leads petitioners to wonder if the federal appellees were engaged in redneck fun outside of the library when they first made this argument. In any event, the federal appellees argued speciously that the district court judge could execute a certificate of finality pursuant to Rule 54(b) and swiftly eliminate the petitioner-appellants' right to take an immediate appeal through mere allusion to Rule 62(h). This is nonsense.

No court in the land has held that a district court judge can execute a certificate of finality and subsequently prohibit an immediate appeal of the certified order. The Court of Appeals accepted this flawed argument when it granted the appellees Rule 27 motion to dismiss for lack of jurisdiction over the appeal on grounds that the district court judge could legitimately block an immediate appeal of his own self-certified order.

The Court of Appeals in view of existing precedent knew or should have known that this reasoning was dark and in error.

In order to lose its statutory jurisdiction over an appeal as of right from a final order, the appellate court had to assess and disturb the district court certification. The Court of Appeals did not and does not intend to challenge the propriety of the district court certification and its clearly unreasonable decision to prevent the petitioners from taking an immediate appeal from a final order.

Unless and until this Court reviews the work of the court of appeals, petitioners don't have a horse in this race. Without review of their writ by this Court, Petitioners have as much hope of obtaining due process of law as they do of summoning a unicorn out of the woods.

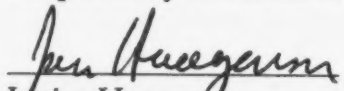
Petitioners are being beaten to death, in a legal sense, while the appellate court is cold sober. The Third Circuit Court of Appeals apparently does believe that it never had jurisdiction over the appeal, even though the district court executed a certificate of finality, which the Third Circuit never disturbed. The conduct of the district court judge has not been scrutinized by the Third Circuit; it has been endorsed, as has the self-serving conduct of the federal appellees.

The federal attitude is that the truth is not for everyone. By no means is this a constitutional regime.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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October 24th, 2002

APPENDIX

APPENDIX A — Clerk's denial of Petitioner-Appellants' Rule 27 Motion for Correction of Record and Issuance of Mandate

UNITED STATES COURT OF APPEALS
FOR THETHIRD CIRCUIT

No. 01-4118

Grine v. Coombs

To: Clerk

1) Appellant's Rule 27 Motion for Correction of Record and Issuance of Mandate

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The foregoing Motion is denied. The appeal was decided by an order on a motion and not by the entry of a formal judgment. Rule 41, Federal Rules of Appellate Procedure, requires the issuance of a mandate only when a formal judgment is entered. The purpose of the mandate is to return jurisdiction back to the district court and to convey any directives of the court of appeals to district court. Since this Court determined that it lacked appellate jurisdiction over the appeal, neither of those purposes would have been served by issuance of a mandate.

The February 27, 2002 order dismissing the appeal was certified to the district court on the date that it was issued. Since this Court never had jurisdiction over the matter, jurisdiction would not have been lost through the certification of that order to the district court.

It is further noted that the issuance of a mandate has no effect on the time deadlines for filing a petition for a writ of certiorari. Rule 13.2, Supreme Court Rules.

Accordingly, no mandate has, or will, issue in the appeal nor was one required.

For the Court,
/s/Marcia M. Waldron
Clerk

Dated: August 29, 2002

DMM/cc: Janice Haagensen, Esq.
Bonnie R. Schlueter, Esq.
Russell F. Smith III, Esq.

Received and Filed
8-29-02 DM
Marcia M. Waldon,
Clerk

APPENDIX A